Supreme Court, U.S.
FILED
OCT 20 1994
OFFICE OF THE CLERK

(3)

No. 94-515

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

JANET MITCHELL, et al,

Petitioners

v.

AMARILLO HOSPITAL DISTRICT, et al

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

MARTIN'S BRIEF IN OPPOSITION

Don M. Dean
Kelly Utsinger
UNDERWOOD, WILSON, BERRY, STEIN & JOHNSON, P.C.
P.O. Box 9158
Amarillo, Texas 79105-9158
(806) 376-5613
(806) 379-0316 - FAX

20 pp

PARTIES TO THE PROCEEDINGS

Counsel of record certifies that the following listed persons have a direct interest in this case:

Petitioners/Plaintiffs

1. Janet Mitchell on behalf of herself, the estate of Mike Mitchell, deceased, and her minor children, Valerie Nicole Mitchell and Clayton Lee Mitchell.

2. Dale Mitchell, father of Mike Mitchell, deceased.

Respondents/Defendants

1. Amarillo Hospital District doing business as Northwest Texas Hospital.

2. Raymond A. Martin, M.D. individually and in his capacity as Director of the Department of Anesthesia of Amarillo Hospital District.

3. Raymond A. Martin, M.D., P.A.

TABLE OF CONTENTS

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS TO REFUSE THE WRIT 5

1. *The substantive due process pleading standard needs no clarification and this case would only confuse the pleading process* 5

2. *Conscience shocking criticisms do not warrant a revision of substantive due process review in this case* 8

3. *Substantive due process analysis in non-custodial settings would not be advanced in this case* 9

4. *The pleadings in this case do not warrant this Court's review* 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Collins v. The City of Harker Heights, Tx, 503 U.S. 112 S.Ct. 1061, 117 L.Ed.2d. 261 (1992) 5

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. ____, 107 L.Ed.2d. 420, 427 11

Middlesex County Sewerage Authority v. National Sea Clammers Assoc., 453 U.S. 1, 28, 101, S.Ct. 2615, 69 L.Ed.2d. 435 (1985) 11-12

Pembaur v. Cincinnati, 475 U.S. 469, 89 L.Ed.2d. 452, 106 Ct. 1292 (1986) 8

Planned Parenthood v. Casey, 505, 120 L.Ed.2d. 674, 697, 112 S. Ct. (1992) 10

Reno v. Flores, 507 U.S. 123 L.Ed.2d. 1, 16, 13 S Ct. (1993) 6

Zinermon v. Burch, 494 U.S. 113 (1990) 14

TABLE OF AUTHORITIES
(Continued)

Statutes and Miscellaneous

Federal Controlled Substances Act, 21 U.S.C. § 801 . . . . . 2, 4, 10, 11

H.R. Rep. No. 91-144, 91st Cong., 2nd Sess. reprinted in 1970 U.S. Code Cong. & Admin. News 4566, 4567 . . . . . 11, 12

Texas Medical Practice Act, Tex. Rev. Civ. Stat. Ann. Art. 4495b, § 306(d) 4

No. 94-515

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1994

JANET MITCHELL, et al,

Petitioners

v.

AMARILLO HOSPITAL DISTRICT, et al

Respondents

DEFENDANT MARTIN'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

JURISDICTION

Respondent Martin maintains that this Court's jurisdiction should not be invoked under 28 U.S.C. § 1254(1) (1988) because this case does not arise from the "courts of appeals." See 28 U.S.C. § 1291. Petitioners' stated grounds for review are therefore insufficient to invoke the jurisdiction of this Court.

STATEMENT OF THE CASE

This is a medical negligence suit originally filed against a surgeon, Dr. Baay; nurse anesthetist Adamson; Northwest Texas Hospital, "the Hospital"; and the Hospital's director of anesthesiology, Dr. Martin.[1] No constitutional contentions are properly asserted under the undisputed facts. Petitioners sued Dr. Martin, the titular director of anesthesia at the hospital, under theories of negligence per se and fraud (fifth cause of action), negligence (6th cause of action), violations of Mike Mitchell's substantive and procedural due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1 §§ 13 and 19 of the Texas Constitution, seeking recovery under 42 U.S.C. § 1983 (7th and 8th causes of action) and infringement of rights under the Federal Controlled Substances Act, 21 U.S.C. § 801 et seq., alleging a civil rights claim under 42 U.S.C. § 1983.

Petitioners' Statement of Facts correctly describes the disposition of Petitioners' suit before the District Court, Court of Appeals and the Texas Supreme Court. Although Respondent Martin maintains that the Court of Appeals was in error in its determination that he was acting under a color of state law, the ultimate resolution of the case, rejecting the federal and state co[illegible] claims, was correct. Accordingly, Dr. Martin did not raise by motion for rehearing or application

---

[1] Nurse Anesthetist Adamson and operating room physician Baay settled their claims with the Mitchells. (Petitioners' A-12). Although the substantive pleaded facts, Petitioners' A-49-79, assert negligence allegations against the hospital and Martin, these pleadings expressly exclude any claims against the hospital under the Texas Tort Claims Act. (See Tex. Civ. Prac. & Rem. Code §§ 101.023 and 102.003, placing monetary limitations upon the amounts which can be recovered against state or local governmental entities.)

for writ of error to the Texas Supreme Court the color of law determination by the Court of Appeals.[2]

The decision of the Court of Appeals outlines certain undisputed facts which, when understood, makes suspect the allegations contained in Petitioners' pleadings.

1. Martin's Motion for Summary Judgment alleged that he was contractually bound by an employment agreement with the hospital from December 1, 1986 to January 1, 1987, but had refused to extend the terms and conditions of his contract from January 1, 1987 to March 1, 1987. Mitchell was hospitalized on February 24, 1987. (Petitioners' A-7).[3]

2. Martin contended that he served only as an administrative scheduler, was not on call when Mitchell's surgery was performed and had no doctor-patient relationship with Mitchell. (Petitioners' A-7).

---

[2] From a procedural standpoint, the dismissal of this suit based upon the failure to properly plead a cause of action under 42 U.S.C. § 1983 and the granting of the Motion for Summary Judgment on state court claims made it unnecessary for Martin to complain on appeal about acting-under-color-of-law determination. The capacities in which Martin has been sued and any potential liability associated with them is denied by Martin. Whether Martin was acting under color of state law when Mitchell was treated is a matter which turns on the facts. Because such contested factual determinations were unnecessary to the resolution of the issues in dispute, Martin has not challenged the color-of-law determination of the Court of Appeals at this time. Martin, however, does not waive his contention that he was not acting under color of state law and expressly reserves the right to assert such contentions in the event a trial on the merits ever occurs.

[3] No joint appendix has been filed. All record references in this response are the Petitioners' Appendix pages.

3. In his official position, Martin was administering the existing scheduling policy of the hospital. He did not have the authority to change the policy. He had suggested a change that would have placed anesthesiologists rather than CRNA's on first call, but the hospital's policy was not changed. Martin was therefore not responsible for establishing the final policy for scheduling anesthesia. According to the policy which he administered, Martin scheduled CRNA Adamson on first call on the date of Mitchell's surgery. (Petitioners' A-37).

4. Martin was not present for Mitchell's surgery. He could not have made the final decision concerning personnel to administer anesthesia. Nothing in the record shows that Martin knew or had reason to know of any risk presented to Mitchell. (Petitioners' A-38).

5. According to the hospital anesthesia policy, the operating surgeon has the option to determine the personnel needed to administer anesthesia. Baay, who is in the best position to foresee the need for an anesthesiologist, made no request for an anesthesiologist. (Petitioners' A-37 - A-38).

6. The Court of Appeals correctly noted that under the Texas Medical Practice Act, Tex. Rev. Civ. Stat. Ann. Art. 4495b, § 306(d) that a physician is authorized "to delegate to any qualified and properly trained person" the act of administering dangerous drugs. (Petitioners' A-39). Petitioners have not alleged that Adamson by his CRNA certification was not such a person.

7. The Court of Appeals similarly correctly determined that the Federal Controlled Substances Act, 21 U.S.C. §§ 829, 841 (1988) neither granted a private right nor provided a cause of action to the Petitioners. Because no

federal right was asserted, no § 1983 action under the Federal Controlled Substances Act was available to Petitioners. (Petitioners' A-34).

8. Mitchell was voluntarily admitted to the hospital with a heart condition requiring immediate and necessary medical treatment. Mitchell signed a consent form before surgery which, given his condition at the time of admission, was constitutionally adequate as to due process. (Petitioners' A-31 - A-32).

9. Petitioners' pleadings allege common law negligence, not the deprivation of constitutionally protected life, liberty or property interests. Petitioners' allegations cannot be characterized as arbitrary, or conscious shocking, in a constitutional sense. (Petitioners' A-26).

REASONS TO REFUSE THE WRIT

1. *The substantive due process pleading standard needs no clarification and this case would only confuse the pleading process.*

Arguing that the writ should be granted because inferior courts have failed to follow *Collins v. The City of Harker Heights, Tx*, 503 U.S. ____, 112 S.Ct. 1061, 117 L.Ed.2d. 261 (1992), petitioners invite this Court to redefine constitutional torts in non-custodial settings. Assuming for the sake of argument that lower courts have failed to properly apply the *Collins'* "conscious-shocking," "arbitrary" substantive due process considerations, this contention does not justify revisiting this Court's pronouncements in a non-custodial, medical negligence suit. If lower courts have chosen to elevate traditional tort law to constitutional proportions by their decisions, those determinations are

contrary to the clear expression of this Court in *Collins.* The *Collins* fact scenario does not raise such sufficiently distinguishable facts so as to warrant reconsideration of the substantive due process pleading requirements here. Both in *Collins* and the instant case, policy decisions which should best be left to the governmental entities themselves without federal judicial or constitutional interference have been challenged.

Neither case presents a legal right worthy of a substantive due process claim. Any substantive due process analysis must begin with a careful description of the asserted right, because the doctrine of judicial self-restraint should be exercised with the utmost care. *Reno v. Flores,* 507 U.S. ____ 123 L.Ed.2d. 1, 16, 13 S Ct. _____ (1993). Petitioner has failed to articulate in her pleadings, as well as her petition to this Court, a right so fundamental to liberty interests to invoke the Fourteenth Amendment's guaranty of due process of law. When reduced to its basic terms, the right asserted by Petitioners is to be informed while in the throes of a cardiac emergency that a certified nurse anesthetist, under the supervision of an operating room physician, might administer anesthesia. The due process clause has never been, nor should it ever be, construed to encompass such a circumstance.

In *Collins,* the city's failure to train or warn its employees about danger in the work place was in issue. No fundamental liberty right was presented. Here, the scheduling of a nurse anesthetist rather than an anesthesiologist is the policy in issue. No fundamental liberty interest is raised. Neither *Collins* nor this case present Fourteenth Amendment guarantees of due process of law which justify "breaking new ground in the field." *Collins,* 117 L.Ed.2d. 273.

The "arbitrary" or the "conscience shocking" standard needs no further clarification in the context of the instant suit. This Court has clearly indicated that the due process clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Collins,* 112 S.Ct. at 1070. Petitioners' attempt to cloak a medical negligence suit in Fourteenth Amendment raiment is designed to federalize medical malpractice suits. As correctly noted by this Court, the due process clause should not be so extended.

Explaining that arbitrary in a constitutional sense involves the presumption that the administration of government programs is based on a rational decision-making process that takes account of competing social, political and economic forces, this Court has provided sufficiently specific guidelines for asserting substantive due process claims which rise to the level of constitutional torts. *Collins,* 117 L.Ed.2d. 275. In the context of this suit, the policy choices regarding treatment of voluntarily admitted patients are far better suited for the Hospital's medical staff than "federal judges interpreting the basic charter of Government for the entire country." *Collins,* 117 L.Ed.2d. 275.

Moreover, this Court in *Collins* explained that from a historical perspective, the due process clause was intended to secure the individual from the arbitrary exercises of the powers of government. Neither the text nor the history of the due process clause support liberty deprivation allegations when voluntary acts resulting in personal harm are involved. *Collins,* 117 L.Ed.2d. 274.

When the rules articulated in *Collins* are viewed against the background of the pleadings of the Petitioner, substantive due process allegations require no additional

clarification on these facts. Petitioner's first reason for granting the writ should be denied. Given the pleadings in this case, substantive due process deprivations are not sufficiently alleged to suggest the commission of a tort of constitutional proportions.

2. *Conscience shocking criticisms do not warrant a revision of substantive due process review in this case.*

Ignoring the language of *Collins* that applied a disjunctive "arbitrary" or "shock-the-conscience" standard, Petitioners suggest in their second reason for granting writ that prior concurring opinions of this Court have been critical of applying a "shock-the-conscience" standard. None of the cited cases challenged the application of this standard in a non-custodial, voluntary circumstance involving allegations of due process violations. Granting the writ in this case would not provide a suitable context for clarifying the standard.

Before a frontal assault is mounted against the shock-the-conscience standard, perhaps this Court should consider the pleaded allegations against Martin. None are grounded on conventional due process violations. No fundamental liberty interest is articulated; no policy made by Martin is challenged.

Mitchell presented himself voluntarily for treatment for cardiac failure. He was never in the custody of Martin. He was not deprived of his liberty by Martin. He was never treated or seen by Martin.

Martin was not "responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. Cincinnati,* 475 U.S. 469, 89 L.Ed.2d. 452, 106

Ct. 1292 (1986). Martin, whose contract as Director of Anesthesia had expired, had suggested a policy change but was without authority to enact it. He was only a scheduler, acting in accordance with a policy which he neither established nor had the authority to change.

Under any definition of due process, Martin's actions could never be conscience shocking. Criticisms of this standard do not justify redefining due process theories based upon the acts of Martin.

Petitioners' challenge to the vagueness of the shock-the-conscience standard as it relates to Martin is designed to distract this Court's attention from the fundamental factual allegations raised by the pleadings. Martin did nothing which could be construed to present a liberty deprivation under the due process clause. His behavior was not arbitrary. It was not conscience-shocking. Petitioners' case-specific request for a more precise definition of conscience shocking is of no moment when this Court considers the allegations against Martin. Petitioners' second reason for granting the writ is unwarranted as to Martin.

3. *Substantive due process analysis in non-custodial settings would not be advanced in this case.*

No fundamental liberty right sufficient to touch upon the Fourteenth Amendment's due process clause is asserted in this case. Absent such a right in issue, granting Petitioners' writ would only confuse, not clarify substantive due process claims in non-custodial circumstances. Petitioners' argue, however, that this case provides an opportunity for the Court to distinguish deliberate indifference from arbitrariness. Given the pleadings, quite the contrary is presented. The Petition represents nothing

more than an effort to reduce substantive due process in the non-custodial context to a precise formula and to depart from the precepts of judicial restraint on substantive due process issues which were confirmed in *Collins.*

Petitioners' third point implores this Court to clarify and to give content to substantive due process issues. This clarification was provided by *Collins.* Petitioners' request is to expand the parameters of due process by creating a medical malpractice constitutional tort. The deliberate indifference/arbitrariness subterfuge is the medium for this agenda. The parameters of due process should not be so expanded.

Whether described in terms of conscience shocking, deliberate indifference or arbitrariness, the "inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercise: reasoned judgement." *Planned Parenthood v. Casey,* 505 ____, 120 L.Ed.2d. 674, 697, 112 S. Ct. ____ (1992). When reasoned judgment is applied to this Court's reticence to expand the concept of substantive due process as articulated in *Collins,* the semantic distinctions drawn by Petitioners' in their appeal to this Court are without merit. Elevating the Hospital's policy to constitutional levels is not warranted. More importantly, dignifying the allegations against Martin as substantive due process assertions is unprecedented.

To bootstrap themselves into a constitutional tort, Petitioners maintain that their bare allegations of criminal deliberate indifference constitute an assertion of due process violations. A careful analysis of the Federal Controlled

Substances Act 42 U.S.C. §§ 801 *et. sec.* demonstrates such claims cannot withstand due process scrutiny.

The use of §1983 to enforce statutory violations is allowed only when the federal statute creates an enforceable right in the plaintiff. *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1, 19, 101, S.Ct. 2615, 69 L.Ed.2d. 435 (1985); *Pennhurst State School,* 451 U.S. 1. Even when an enforceable right is created, enforcement of the right pursuant to a §1983 action will not be allowed when Congress has foreclosed it through the provision of an extensive remedial statutory scheme. *Middlesex County,* 453 U.S. at 28. The Federal Controlled Substances Act creates no enforceable right in the Plaintiffs in this case. Further, the Act's extensive remedial scheme and enforcement procedure indicate that Congress intended to foreclose the use of §1983 to enforce the Act.

Section 1983 does not provide a remedy to enforce all violations of federal law. It provides a remedy only for the deprivation of "rights, privileges and immunities" conferred upon individuals either by the Constitution or federal statute. See, *Golden State Transit Corp. v. City of Los Angeles,* 493 U.S. ____, 107 L.Ed.2d. 420, 427. If the statute does not create an enforceable federal right, then a §1983 action will not exist to remedy the statute's violation. The Act does not confer on Plaintiffs here a judicially enforceable federal right.

Plaintiffs have not cited this court to any provision of the Act which grants Plaintiffs or persons similarly situated any rights, governmental entitlements, or benefits. The Act is simply not designed to confer rights on individuals or specified groups. Instead, the Act is a broad criminal statute enacted out of congressional concern regarding the effect of the importation, manufacture, distribution and improper use

of controlled substances on the American public. See, 21 U.S.C. 801(2) (1981). Its purpose was not to confer individual rights but "to deal in comprehensive fashion with the growing menace of drug abuse in the United States." H.R. Rep. No. 91-144, 91st Cong., 2nd Sess. reprinted in 1970 U.S. Code Cong. & Admin. News 4566, 4567. Since the Act confers no enforceable private rights, its violation cannot form the basis of a §1983 action.

Even if an individual right existed under the Act, its comprehensive enforcement scheme would preclude the use of §1983 in this case. It is well established that Congress can foreclose the use of §1983 as a remedy for enforcing a federal statute by creating within the statute a comprehensive enforcement mechanism for the protection of the statutorily created rights. *Middlesex County,* 453 U.S. at 20.

The enforcement and penalties portions of the Act play an integral part in the implementation of the Act's purpose of dealing with drug abuse in American society. "This legislation is designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States . . . (3) by providing for an overall balanced scheme of criminal penalties for offenses involving drugs." H.R. Rep. No. 91-1444, 91st Cong., 2nd Sess. reprinted in 1970 U.S. Code Cong. & Admin. News 4566, 4567. "The bill revises the entire structure of criminal penalties involving controlled drugs by providing a consistent method of treating all persons accused of violations." H.R. Rep. No. 91-1444, 1970 U.S. Code Cong. & Admin. News at 4570.

The Act provides various penalties to be imposed on persons who dispense controlled substances in violation of the Act. These penalties include confinement in prison, 21 U.S.C. §841 and §842(c)(2); the imposition of civil monetary

penalties, 21 U.S.C. §842(c)(1); injunctive relief, 21 U.S.C. §841(f); forfeiture of property, 21 U.S.C. §853; and suspension or revocation of a practitioner's registration to dispense controlled substances, 21 U.S.C. §824. Additionally, the Act contains detailed administrative and enforcement provisions which empower the attorney general to investigate and prosecute certain violations of the Act. 21 U.S.C. §§871-888.

Allowing a private plaintiff to pursue violations of the Act by bringing a §1983 action would most certainly hinder the administration of the Act's enforcement scheme and run contrary to Congressional intent to remedy the nation's drug abuse problem through the formulation of a balanced set of criminal and civil penalties for drug violations. By creating a detailed scheme for the enforcement of drug law violations, Congress has foreclosed the use of §1983 to remedy violations of the Act. Since the Controlled Substances Act confers no judicially enforceable right on the Plaintiffs in this case, and since the Act contains its own detailed enforcement provision, Plaintiffs simply have no §1983 cause of action for the Defendants' alleged violations of the Act. Accordingly, Plaintiff's claims based on the Controlled Substances Act present no fundamental right under the Fourteenth Amendment.

The mere pleading of a violation of the Controlled Substances Act is insufficient to establish a due process claim. Petitioners' third point should be rejected.

4. *The pleadings in this case do not warrant this Court's review.*

Possibly the most compelling reasons to reject Petitioners' writ are the arguments contained in their fourth

reason for granting writ. Here Petitioners allege fraudulent misrepresentations as a basis for their due process claims. Traditional state tort theories are alleged. The true colors of the pleadings are shown.

Contrary to Petitioners' allegations, *Zinermon v. Burch,* 494 U.S. 113 (1990) is distinguishable. The Plaintiff in *Zinermon* was attacking the decision of state officials to use a statutory voluntary commitment procedure to commit and confine Mr. Burch to a state mental hospital. Thus, the defendants in *Zinermon* deliberately decided to infringe upon Mr. Burch's liberty by confining him to a mental hospital and then implemented this governmental decision through the challenged commitment process. *Zinermon* clearly involved both the abuse of governmental power and the deliberate decision to deprive an individual of a constitutionally protected liberty interest. Neither of those factors have been pleaded or are present in this case. *Zinermon* is inapposite. No procedural due process claim can be properly raised by the undisputed facts alleged in the instant suit.

If fraudulent concealment and the illegal practice of medicine are the essence of Plaintiffs' pleadings as alleged in their fourth reason for granting writ, these state law tort claims provide sufficient redress and do not constitute due process assertions. The historical guarantee of due process explained in *Collins* is inconsistent with these traditional tort theories raised by Petitioners. Accordingly, the fourth reason for granting the writ should be denied.

CONCLUSION

Traditional state tort claims should not be elevated to constitutional violations. No fundamental right guaranteed by the due process clause has been alleged. To expand the

parameters of due process under the facts alleged by the pleadings in this case would be inconsistent with the teachings of this Court articulated in *Collins.* The Petition for Writ Certiorari should be denied.

Respectfully submitted,

Don M. Dean
Kelly D. Utsinger
UNDERWOOD, WILSON, BERRY,
STEIN & JOHNSON, P.C.
P.O. Box 9158
Amarillo, Texas 79105-9158
(806) 376-5613
(806) 379-0316 - FAX

/s/
Don M. Dean (Counsel of Record)